

1007 All

MARY KAY INC.,

Plaintiff,

v.

TINA CUNNINGHAM,

Defendants.

CAUSE NO.

12-2712

ORIGINAL

FILED

2012 MAR 9

IN THE DISTRICT COURT OF

GARY FITZGERALDS
DISTRICT CLERK

DALLAS COUNTY, TEXAS

193rd-L

JUDICIAL DISTRICT

PLAINTIFF'S ORIGINAL PETITION

To the Honorable Judge of Said Court:

COMES NOW, Mary Kay Inc., Plaintiff, and files this Original Petition against Defendant Tina Cunningham ("Defendant"), and would show the Court as follows:

I.

DISCOVERY CONTROL PLAN

Pursuant to Rule 190 of the Texas Rules of Civil Procedure, Plaintiff respectfully requests that the discovery of this case be undertaken pursuant to Discovery Control Plan Level 2, as set forth in Rule 190.3 of the TEXAS RULES OF CIVIL PROCEDURE.

II.

PARTIES

1. Mary Kay is a Delaware corporation, licensed to do business in the State of Texas. Mary Kay maintains its principal place of business at 16251 Dallas Parkway, Addison, Texas 75001.

2. Tina Cunningham is an individual residing at 1213 N. Division Avenue, Urbana, Illinois 61801-1831.

III.
JURISDICTION AND VENUE

3. This Court has subject matter jurisdiction over this case because the amount in controversy exceeds the Court's minimum jurisdictional requirements. This Court has personal jurisdiction over Defendants, and venue is proper in Dallas County, because this dispute arises out of an agreement between Plaintiff and Defendant providing that any dispute "shall be submitted to the jurisdiction of the courts of the State of Texas and the parties agree that the proper venue shall be Dallas, Dallas County, Texas."

IV.
FACTS

4. Mary Kay is a manufacturer and wholesale distributor of cosmetics, toiletries, skin care, and related products. The worldwide success of Mary Kay is undeniable; the Company's products are now sold in over thirty-five markets around the world. Founded in 1963, Mary Kay has become one of the largest direct sellers of skin care products and color cosmetics in the United States.

5. Mary Kay's international success can be attributed to the carefully designed business model it created for the marketing, sale, and distribution of its products. Through this business model, Mary Kay produces the highest quality products and sells them directly to its Individual Beauty Consultants ("IBC"), who then sell the products to their customers, the ultimate consumers. An individual becomes an IBC when she/he submits an IBC Agreement, which is accepted by Mary Kay at its Dallas, Texas Headquarters, and then purchases a demonstration kit containing product samples and general information for use in her/his business.

6. The IBC Agreement also places obligations on the IBC designed to protect the stature of the Mary Kay's trademarks. The terms of the IBC Agreement prohibit IBCs from using the Mary Kay name or trademark in any advertising, specifically prohibiting the use of the Mary Kay name and trademark in internet advertising or sales without Mary Kay's prior written approval. Mary Kay expressly retains the exclusive right to use and advertise the Mary Kay name and trademark at its discretion and in a manner consistent with the Mary Kay business model.

7. Defendant was a Mary Kay IBC and fully bound by the terms of the IBC Agreement. Defendant breached her Agreement by selling or facilitating the sale of Mary Kay products through channels prohibited by the IBC Agreement.

8. Defendant has been facilitating the sale of Mary Kay cosmetics on eBay, Inc. ("eBay") under the username "tina9965," in violation of Texas law. Defendant is a former IBC, contractually prevented from selling Mary Kay products online. Mary Kay did not authorize the sale of any of its products, or the use of its trademarks or trade dress, on eBay. Further, Mary Kay did not authorize any person to sell any of its products to Defendant for the purpose of reselling such products on eBay.

V.
CAUSES OF ACTION

A. Breach of Contract

9. Plaintiff hereby incorporates by reference the foregoing paragraphs as if set forth fully herein.

10. Defendant entered into the IBC Agreement with Mary Kay. She was bound by the terms of that Agreement. Defendant breached that Agreement by selling and/or facilitating the sale of Mary Kay products through channels which were specifically prohibited in the IBC

Agreement. This breach has caused Mary Kay substantial injury in an amount which exceeds the minimum jurisdictional limits of this Court.

B. Tortious Interference with Contract

11. Plaintiff hereby incorporates by reference the foregoing paragraphs as if set forth fully herein.

12. The IBC Agreement sets forth specific parameters which govern the relationship between the Beauty Consultant and Mary Kay. The IBC Agreement specifically limits the channels through which Mary Kay products may be sold.

13. Defendant knowingly and intentionally interfered with the IBC Agreement by purchasing Mary Kay products from Mary Kay Beauty Consultants, knowing that such purchase was strictly prohibited by the IBC Agreement. This interference proximately caused Mary Kay substantial and actual injury in an amount which exceeds the minimum jurisdictional limits of this Court.

**VI.
PRAYER**

WHEREFORE, Plaintiff prays that this Court enter judgment in its favor and against Defendant on all of Plaintiff's claims and award Plaintiff the following relief:

- A. Compensatory damages in an amount to be determined at trial;
- B. Pre and post-judgment interest;
- C. Punitive damages;
- D. Injunctive relief;
- E. Plaintiff's attorneys' fees and costs incurred in prosecuting these claims as allowed by law; and,
- F. Such other and further relief as this Court deems just and equitable.

Respectfully submitted,



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March 6, 2012

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GARY FITZSIMMONS
DISTRICT CLERK
DALLAS CO., TEXAS
DEPUTY

122712

193rd-L

Gary Fitzsimmons, District Clerk
600 Commerce St., Suite 103
George Allen Courts Building
Dallas, Texas 75202

Re: *Mary Kay Inc. v. Tina Cunningham*
Dallas County District Court

Dear Mr. Fitzsimmons:

I have enclosed the original and two copies of Plaintiff's Original Petition for filing, along with my firm's check in the amount of \$260.00 to cover the fees associated with filing the petition and preparing a citation. Please file the original, prepare a citation, and return file-stamped copies and prepared citation to the awaiting courier for service.

Thank you for your assistance with this matter. If you have any questions, please do not hesitate to contact me.

Sincerely,



Preston R. Mundt

PRM:jcc
Enclosure
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